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Supreme Court of the United States

Docket No. ~~884~~ 137

BEARD-LANEY, INC., PLAINTIFF-APPELLANT,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND ASSOCIATED PETROLEUM CARRIERS, DEFENDANTS-APPELLEES.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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INDEX

PAGE

Statement 1

The Ultimate Finding of the Commission that Present and Future Public Convenience and Necessity Require the Granting of the Certificate in Question Must under the Law be Supported by Basic Factual Findings which in Turn Must be Supported by Substantial Evidence. 3

Commission's Findings are not Supported by Substantial Evidence 4

Commission Exceeded its Statutory Authority in Granting Application 7

Commission's Findings Arbitrary, Capricious and Abuse of Discretion 9

The Failure of the Court Below to Find that the Granting of the Application would be Inconsistent with the National Transportation Policy and in Violation of the Federal Anti-Trust Laws is Patent Error 12

Conclusion 16

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TABLE OF CASES CITED

PAGE

American Tobacco Co. v. U. S., 328 U. S., 781 15

Baltimore & Ohio R. R. Co. v. U. S., 264 U. S., 258 11

Eastern States Retail Lumber Dealers' Assn. v. U. S., 234 U. S., 600 16

Fashion Originators' Guild v. Trade Commission, 312 U. S., 457 16

Fine & Jackson Trucking Corp. v. U. S., 65 Fed. Rep., 443 8

Gibony v. Empire Storage & Ice Co., Advance Sheet No. 12, 68 S. Ct., 684 16

Grenada Lumber Co. v. Miss., 217 U. S., 433 16

Hudson Transit Lines, Inc., v. U. S., 82 Fed. Supp., 153 8

Inland Motor Freight v. U. S., 60 Fed. Supp., 520 8

Interstate Commerce Commission v. Parker, 326 U. S., 60 .....8, 12

McLean Trucking Co. v. U. S., 321 U. S., 370 12

Standard Oil Co. of N. J. v. U. S., 221 U. S., 1 15

State of Florida v. U. S., 282 U. S., 194, 214 8

U. S. v. Carolina Freight Carriers Corp., 315 U. S., 475 8

U. S. v. General Motors et al., 121 Fed. (2d), 376, Certiorari denied, 314 U. S., 618, 314 U. S., 710 15

U. S. v. Griffith, 334 U. S., 100 15

U. S. v. Trans-Missouri Freight Assn., 166 U. S., 290 .. 16

U. S. v. Watkins, 73 Fed. Supp., 216 .....5, 7

MOTOR CARRIER DECISIONS OF THE INTERSTATE COMMERCE COMMISSION

PAGE

Bales, Common Carrier Application, 9 M. C. C., 709 .. 14

Blue Nose Bus Co., Ltd., 1 M. C. C., 173 9

Craig Trucking Co. Application, 46 M. C. C., 433 9

D. L. Wartena, Inc., of Illinois, Extension, Texas, Docket MC-69842 (not reported) 11

Earle L. Erdner, Extension of Operations, Frozen Vegetables, 46 M. C. C., 818 14

Geraci, Contract Carrier Application, 7 M. C. C., 369 .. 14

Miller, Extension of Operations, Vernon-Memphis, Texas, 27 M. C. C., 731 10

Pan American Bus Operations, 1 M. C. C., 199 9

Shoemaker, Common Carrier Application, 44 M. C. C., 765 14

Squaw Transit Co., Common Carrier Application, 48 M. C. C., 17 10

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND ASSOCIATED PETROLEUM CARRIERS, DEFENDANTS-APPELLEES.

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

STATEMENT

The application involved in the case at bar stems from and supersedes the operations conducted by the War Emergency Cooperative Association, hereinafter called WECA.

WECA was organized in June, 1942, at the instance of the Office of Defense Transportation and under its sponsorship. It was granted temporary authority as a common carrier to transport petroleum products in bulk, in tank trucks, between all points in North Carolina, South Carolina, Georgia and Florida. That authority is still effective. The members of this Association are the same as the

stockholders of Applicant, who were former private carriers and jobbers and distributors of petroleum products.

During 1942 the Southeastern Pipe Line Company opened a pipe line extending from Port St. Joe, Florida, through Georgia, to Lookout Mountain, Tennessee. This Pipe Line Company published what is called proportional rates. The Plantation Pipe Line was also opened during the year 1942, and it operated through Georgia, South Carolina and North Carolina. This Pipe Line did not publish proportional rates. Private carriers were unable to participate in proportional rates.

At this same time the Office of Defense Transportation had issued an order prohibiting the use of railway tank cars for hauls of two hundred miles or less. Thus it became necessary that the tremendous war-generated burden of this traffic be borne by the motor carriers who, incidentally, were unable to obtain additional equipment or even to maintain adequately what was then in operation. The only apparent solution to the problem was to put existing private carrier equipment to its maximum use; so, WECA, the legitimate sire of the present illegitimate offspring, came into being.

By the instant application it proposes to obtain permanent authority, and Division 5 of the Interstate Commerce Commission, on a record made in October and November, 1945, at the most favorable time for Applicant, first unanimously denied the application, but on reconsideration on that very same record has reversed itself by a two-to-one vote, with Commissioner Patterson dissenting.

When WECA was proposed the existing for-hire carriers opposed it because of their fear of precisely what has happened; but in response to the representations of the Office of Defense Transportation that WECA would be

temporary only, and because of their patriotic desire to support their Government in every conceivable way in its prosecution of the War, they withdrew their opposition and even themselves became members. This patriotism is now being repaid in cruel coin, and through a mere change of name WECA is to be perpetuated.

Appellant, together with other protestants, filed a petition with the Commission for further consideration. This petition was denied by order of the Commission dated October 8, 1948. Appellant then instituted a suit to set aside said order of the Commission. The Court below delivered a written Opinion, filed Findings of Fact and Conclusions of Law and a Decree denying the injunction and other relief prayed for and dismissed the suit.

I. THE ULTIMATE FINDING OF THE COMMISSION THAT PPRESENT AND FUTURE PUBLIC CONVENIENCE AND NECESSITY REQUIRE THE GRANTING OF THE CERTIFICATE IN QUESTION MUST, UNDER THE LAW, BE SUPPORTED BY BASIC FACTUAL FINDINGS, WHICH IN TURN MUST BE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Appellees contend that a second judicial scrutiny of the evidence to determine its inadequacy to support the Commission's order would be a burdensome exercise of appellate review not required in the interest of orderly and efficient administration of justice. This contention is wholly lacking in merit. The administrative procedure act (U. S. C. A., 1009 (e)) scope of review, is applicable to the case at bar, and in particular the following provisions thereof:

> "So far as necessary to decision and where presented, the reviewing Court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability

of the terms of any agency action. It shall * * *; and (B) hold unlawful, to set aside agency action findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (3) in excess of statutory jurisdiction, authority or limitations, or short of statutory right; * * * (5) unsupported by substantial evidence in any case subject to the requirements of Secs. 1006 and 1007 of this Title or otherwise reviewed in the record of any agency provided by statute; * * * and in making the foregoing determinations the Court shall review the whole record, or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

(1) Commission's Findings are Unsupported by Substantial Evidence.

The opinion of the Court below states:

"The portions of the last report which we have quoted above are certainly sufficient when taken in connection with the detailed findings of statutory facts preceding them, as findings that the service which Appellant proposes to render is needed by the public, that it cannot be furnished by other carriers operating within the territory and that it will not result in destructive competition hurtful to the public interest; * * * and there can be no question that the evidence before the Commission amply supports this finding. Witness after witness testified as to the need for the service; documentary evidence shows that the operating authority of the protesting carriers is so limited that they cannot service the territory allotted to Applicant; and the fact that WECA is now handling such a large portion of the traffic is sufficient basis for the finding that the substitution of Applicant in its place will not result in competition hurtful to the public interest."

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We submit that a review of the evidence will show that the conclusion of the Commission of a need for the service, and approved by the Court below, is not supported by any substantial evidence.

In reviewing administrative findings the Court must always determine whether the findings are supported by substantial evidence. It is no longer sufficient, as has been true in some instances, that the findings be supported by some evidence.

United States v. Watkins, 73 Fed. Supp., 216, 219.

The testimony of the "public interest" witnesses **as to the need for the service,** with one exception, showed that the services rendered by the for-hire carriers prior to the War were satisfactory and adequate (R. 216, 266, 275, 291-302, 333-5, 385-6, 406-7, 425-6, 457-8, 522-3, 577 et seq., 614, 627-9, 671, 895) and nowhere is it disputed by the Commission in its second report.

In its second report the Commission found (Sheet 5) that

> "at least **one witness** in the proceeding complained of protestant's service on the ground that the carriers were either busy or under contract with someone else and **not because of limited operating authority**" (Emphasis added).

The documentary evidence (Exhibit 7) shows gallons hauled and names of shippers for six weeks' period just prior to the hearing. Approximately 67% of the gallonage shown was hauled for shippers such as the Army Air Forces, The Texas Company, Gulf Oil Corporation, Sinclair Refining Company, Shell Oil Company and Standard Oil Company of New Jersey, who were conspicuous by their failure **to testify and support the need for applicant's service.**

Furthermore, Exhibit 8 shows the terminals at which this gallonage originates, and

> "between 50 and 55% of that moving in interstate commerce" (R. 108-9);

but nowhere is there any evidence of this gallonage moving from the origin points shown thereon to all points and places in the States of North Carolina, South Carolina and Georgia. Neither is there any evidence of any traffic originating at Morehead City and New Berne, N. C. which the Commission authorized to be served.

And the Commission in its first report (Sheet 5) found[1] that

> "At the time of the hearing WECA was transporting shipments of petroleum products from Camp Croft to points in western North Carolina, and from Thrift to a small area in South Carolina contiguous to Thrift. Shipments are being made from Chattahoochie to points in South Carolina and North Carolina; from Macon, Ga. to points in South Carolina; from Wilmington to a small area in South Carolina; and from Savannah to points in South Carolina."

Exhibits 42, 43, 44 and 45 show operating authority of appellant. It has the authority to render the service being performed by WECA at the time of the hearing.

Exhibits 33, W. C. Chaplin Transport; 37 and 38, Vaughan's Transfer; 52, The George A. Rheman Co., Inc.; 57, Walter Hauling Co.; 67, Petroleum Transportation, Inc.; testimony of the witness Grass (R 999) for Petroleum Carrier Corporation, shows that the operating authority of these carriers collectively to be sufficient to transport the movement of the traffic handled by WECA as aforesaid,

[1] The Commission in its second report (Sheet 1) stated: "The facts stated in our prior report are not disputed, and that report is referred to and made a part hereof."

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as well as to handle such traffic "as will normally move in interstate commerce (Sheet 11, first report)."

It thus appears that the statutory Court apparently overlooked this evidence, and failed to determine whether or not the findings are supported by substantial evidence.

> "Substantial evidence is evidence of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference or fact which is sought to be sustained. It implies the quality of proof which induces conviction and which makes a definite impression on reason. It must be more than a scintilla of evidence and more than a suspicion or surmise. It must be more satisfying than hearsay or rumor. Mere rags and tatters of evidence are not sufficient. Some Courts have gone so far as to say that evidence subject to one or two inferences is not substantial. The test in determining what constitutes substantial evidence in an administrative proceeding is the same as that applied in trials by jury." *United States v. Watkins, supra.*

(2) The Commission Exceeded its Statutory Authority in Granting the Application.

The Commission failed to apply the statutory standards for making the subordinate basic findings of public convenience and necessity. We submit that the Court below in its opinion clearly shows this to be true when it stated:

> "The portion of the last report which we have quoted above is certainly sufficient, when taken in connection with the detailed findings of evidentiary facts preceding them, as findings that the service which the Applicant proposes to render is needed by the public; that it cannot be furnished by other carriers operating within the territory; and that it will not result in destructive competition hurtful to the public interest. We may not ignore these facts because made in the

form of a narrative order rather than in separately numbered paragraphs."

Here we have the Court supplying the necessary basic subordinate findings which the Commission failed to do by spelling out, arguing and choosing between conflicting inferences in the Commission's discussion of the evidence.

The findings by the Commission must be specific and definite, at least sufficiently simple and clear so as not to leave to the Court the burden of being compelled to spell out, to argue and to choose between conflicting inferences.

Inland Motor Freight v. U. S., 60 Fed. Supp., 520;
Fine & Jackson Trucking Corp. v. U. S., 65 Fed. Supp., 443;
Hudson Transit Lines, Inc., v. U. S., 82 Fed. Supp., 153;
State of Florida v. U. S., 282 U. S., 194, 214;
U. S. v. Carolina Freight Carriers Corp., 315 U. S., 475.

The Court below relied on the case of *I. C. C. v. Parker*, 326 U. S., 60, 69, where the contention was made that there was no basis for issuing a certificate to a railroad to operate a motor line, since no evidence was offered as to the inadequacy of the motor carriers then holding certificates to serve the railroad's need.

We submit that the *Parker case, supra* is not controlling on this question, as will appear from the language of the Court in disposing of the above contention, when it was said:

"Consequently, the issuance of the certificate is subject to all the requirements of any other application for a certificate for operation of motor lines. Since, however, on adequate evidence the Commission found that the motor service sought was of a different char-

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acter from the existing motor service and not directly competitive or unduly prejudicial to the already certificated motor carriers, 42 M.C.C. 725, 726, we hold that the Commission had statutory authority and administrative discretion to order the certificate to issue."

In the case at bar the evidence shows that the character of the service to be porformed by Applicant is the same as that performed by Appellant and other existing carriers. The Commission in its second report also admits that Appellant and other existing carriers "may be at some competitive disadvantage." (Sheet 7.)

(3) Commission's Findings Arbitrary, Capricious and Abuse of Discretion.

We submit that a review of the Commission's second report and the evidence will show that the Commission refused to make essential findings as to:

> "Whether the new service will serve a useful purpose responsive to a public demand or need;
>
> "Whether this purpose can and will be served as well by existing carriers; and
>
> "Whether it can be served by Applicant in a new operation or service without endangering or impairing the operations of existing carriers, contrary to the public interest;"

as required by decisions of the Commission, and that same are not supported by substantial evidence.

> *Pan American Bus Line Operations,* 1 M. C. C., 199, 203;
>
> *Blue Nose Bus Company, Ltd.,* 1 M. C. C., 173, 176;
>
> *Craig Trucking Co. Application,* 46 M. C. C., 433.

The substantial evidence indicates that there is an abundance of motor carriers transporting petroleum prod-

ucts in bulk in tank trucks with sufficient equipment, resources and operating authority to collectively provide all the service from the terminals to the territory which petroleum products will normally move in interstate commerce. (Sheet 11 prior report.)

The Commission also concluded (Sheet 12 prior report) that:

> "Although many of the witnesses indicated a preference for Applicant's service, mere desire for such service over that of existing authorized carriers is insufficient to warrant a finding that public convenience and necessity require Applicant's service."

The Commission in a recent decision (Squaw Transit Company, Common Carrier Application, decided March 1, 1948, 48 M. C. C., 17, 22) stated:

> "We have consistently adhered to the view that existing carriers are entitled to handle any available traffic which they can handle economically and efficiently, and that the operation of existing economic conditions in the motor carrier industry would be jeopardized by allowing new operations to enter a field in competition with existing carriers who are furnishing adequate and efficient service."

The only substantial evidence in the record in favor of Applicant is that during the abnormal period brought about because of the War, a large volume of petroleum products was hauled by trucks operating under its temporary authority. The Commission's policy, as expressed in *Miller, Extension of Operations-Vernon-Memphis,* Tex., 27 M. C. C., 731, is that evidence of wartime conditions is not acceptable as proof of public convenience and necessity under normal peacetime conditions.

Furthermore, the Commission states in its second report (Sheet 7):

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• • • "While it appears that other carriers may be at some competitive disadvantage • • •"

clearly an admission that the granting of the Application will endanger and impair the operation of existing carriers.

The Commission has heretofore refused to grant certificates to common carriers found to be dominated by shippers.

D. L. Wartena, Inc., of Illinois Extension, Tex. Docket MC 69842 (not reported).

The Commission refused to apply the evidence in the case at bar to its policy as expressed in the above decisions, and the Court below, in disposing of these issues, stated:

> • • • "Protestants were not authorized to render service throughout the territory; and quite apart from this there is nothing in law or in reason which requires that the Commission permit those already in the field to absorb the business which would be relinquished • • •."

Neither the report of the Commission nor the decision of the Court below has pointed out any fair or substantial cause, nor given any substantial reason for departing from the express policy and decisions of the Commission as above set out; and the granting of this Application without proper consideration of the evidence, or to make an essential finding as to whether existing carriers are unable or unwilling to meet any reasonable demand that may be made upon them; in changing its policy and granting a certificate based only on evidence of abnormal conditions, and to a carrier dominated by shippers, without any substantial reasons for doing so, is arbitrary action.

Baltimore and Ohio Railroad Co. v. U. S., 264 U. S., 258.

II. THE FAILURE OF THE COURT BELOW TO FIND THAT THE GRANTING OF THE APPLICATION WOULD BE INCONSISTENT WITH THE NATIONAL TRANSPORTATION POLICY AND IN VIOLATION OF THE FEDERAL ANTI-TRUST LAWS IS PATENT ERROR.

The Commission is trusted by Congress to guard against the danger of the development of a transportation monopoly.

> 15 U. S. C. A., 1-7, 15 note;
> *I. C. C. v. Parker*, 326 U. S., 60.

To prevent the creation of a transportation monopoly Congress placed in the Commission power to control such developments. The National Transportation Policy (49 U. S. C. A., preceding Sec. 1) requires the Commission to

> "promote * * * economic * * * service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service without unjust discrimination, undue preference or advantage * * *."

The preservation of independent and competing motor carriers unquestionably has the power of the achievement of this end.

> *McLean Trucking Company v. U. S.*, 321 U. S., 370.

In the case at bar the Commission found in its first report, dated June 30, 1947 (Sheet 11):

> "There are 66 stockholders in the Applicant corporation. Fifty-eight of them are jobbers, distributors, dealers, or so-called agents engaged in buying or selling petroleum products. Most of these distributors and jobbers deal directly with the major oil companies. A few are so-called independents who secure their sup-

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plies in the open market. They are located at widely scattered points in the territory here under consideration. Although no single stockholder handles a large volume of petroleum products, collectively they handle a substantial amount. The petroleum industry is highly competitive. Insofar as the shipments bought and sold by the stockholders are concerned, they could control the routing. Because of their collective buying power, the stockholders would also be in a position to exert strong influence on the routing of all shipments made by the major oil companies in the Southeast. Other common carriers in the affected area would be at a serious disadvantage in competing for the traffic. Opportunity for preferential treatment of the stockholders, who would be shippers, is also apparent. No carrier should be in a position where it can directly or indirectly exert influence on the movement of traffic. Such a situation does not 'foster sound economic conditions in transportation and among the several carriers.' All common carriers should compete for available traffic on an equal footing. Applicant disavows any intention of conducting the proposed operation in a manner other than in strict conformity with the Act. Such disclaimer, although *bona fide*, is immaterial. Upon the facts of record, we find that the granting of the Application would be inconsistent with the public interest and the National Transportation Policy."

And in its second report, dated February 19, 1948, in reversing itself, stated (Sheet 7):

> "While it appears that other carriers may be at some competitive disadvantage, we are inclined to place more emphasis upon the possibility of injury to competing carriers."

All the substantial evidence shows that a large number of private carriers affiliated with the major oil companies have combined, seeking this certificate of public convenience and necessity with intent to control the trans-

supplying of an essential service than upon the

portation of this traffic within the territory. Appellant and other competing motor truck and railroad lines are, therefore, deprived of an opportunity to compete in an open market for transporting this traffic. The Commission in reversing itself and granting this certificate, in popular parlance, has truly put applicant **in the driver's seat**, and has put Appellant among that group of **small business men** who are fast becoming the **vanishing American of today**. Only in its magnitude, only in the greater opportunity offered Applicant to indulge in unfair practices and gross discrimination does this Application differ from many others which the Commission has condemned and rejected.

Shoemaker, Common Carrier Application, 44 M. C. C., 765;

Geraci, Contract Carrier Application, 7 M. C. C., 369;

Bales, Common Carrier Application, 9 M. C. C., 709;

Earle L. Erdner, Extension of Operations, Frozen Vegetables, 46 M. C. C., 818.

Differently stated, in all the other instances known in which a private carrier has sought authority to engage in carriage for hire the Commission has had to consider only that one carrier; here, to the contrary, concert of action by the stockholders of Applicant means that the Commission is, in fact, dealing with many private carriers seeking common carrier authority behind the false front of this Applicant. Through this device each of these private carriers will transport its own traffic, and at the same time, having withdrawn this proprietary traffic from the sum total available to transportation by appellant and other for-hire carrier protestants, will be able, through the strength gained from this amalgamation, to force the major

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oil companies to divert to them (doing business through this pseudo applicant) the greater part of the traffic of others, which but for this undue influence would be competitively open to them.

How can any scheme such as this be more openly in restraint of competition?

How can Appellant, together with the other for-hire protestant carriers, possibly compete for available traffic on an equal footing?

How under any conceivable circumstances can the footing be more unequal?

Unquestionably the Commission has exceeded its statutory limitations, has disregarded the declared policy of congress to prohibit "unfair or discriminatory practices" and has failed in the trust vested in it by Congress to guard against the danger of the development of a transportation monopoly.

U. S. v. Griffith, 334 U. S., 100;
American Tobacco Co. v. U. S., 328 U. S., 781, 809;
Standard Oil Co. of N. J. v. U. S., 221 U. S., 1, 61;
U. S. v. General Motors et al., 121 Fed. (2d), 376;
Certiorari denied, 314 U. S., 618; 314 U. S., 710.

The substantial evidence further shows that Applicant's stockholders also control Coastal Terminals, Inc., and that Applicant is selling tank semi-trailers to its members. Coastal Terminals, Inc., maintains a terminal for the storage and warehousing of bulk petroleum products at Charleston, S. C.

The Commission and Court below failed to consider the effect of the foregoing evidence in determining whether or not the granting of the Application would or would not

create a transportation monopoly, in violation of the National Transportation Policy and the Federal Sherman Anti-Trust Laws; nor was any explanation made or reason given for not considering such evidence.

Combinations to dictate the terms **and control the routing** under which transportation will be supplied are well-recognized trade practices which National legislation can and does prohibit (emphasis added).

(Cf.) *Gibony v. Empire Storage & Ice Co.*, Advance Sheet No. 12, 69 S. Ct., 684;
Grenada Lumber Co. v. Miss., 217 U. S., 433, 440-441;
Eastern States Retail Lumber Dealers' Ass'n v. U. S., 234 U. S., 600, 612-614;
Fashion Originators' Guild v. Trade Comm., 312 U. S., 457, 465;
U. S. v. Trans-Missouri Freight Ass'n, 166 U. S., 290, 324-325.

CONCLUSION

For the foregoing reasons it is evident that the appeal presents substantial questions. It is, therefore, respectfully submitted that the Appellee's motion to affirm be dismissed.

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June ...., 1949.